Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1994

CHORYA A. STATON,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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87 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Attorney intentionally provoked or goaded the Petitioner to move for a mistrial in his criminal case thereby preventing a retrial of the petitioner by virtue of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States?

LISTINGS OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are the same as the parties who appear in the caption of this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHORYA A. STATON,

Petitioner/Appellant,

V.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and The Associate Justices Of The Supreme Court.

Chorya A. Staton, by counsel, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals For the Fourth Circuit in this case.

LIST OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY OTHER COURTS

1. Order of The United States District Court, Eastern District of Virginia, Norfolk

Division, dated July 8, 1993.

2. Unpublished opinion by the United States Court of Appeals For the Fourth Circuit Affirming The Order of The United States District Court, Eastern District of Virginia, Norfolk Division.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOLVED

1. The United States Court of Appeals for the Fourth Circuit decided this case on May 31,

1994. The court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States is set forth in the Appendix at A - C.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

The petitioner, Chorya A. Staton, was arrested on February 27, 1993, as he was allegedly about to meet a Drug Enforcement Agency ("DEA") informant at a motel to purchase 20 kilograms of cocaine. Staton arrived at the motel in possession of approximately $200,000 in order to allegedly purchase the cocaine. Following this arrest, the

car, which the defendant had at the motel, was taken to DEA headquarters and searched for inventory purposes. A loaded firearm was found under the driver's seat and a pair of mens Bally shoes, size 10 1/2 and containing heroin, was found in the trunk.

Staton was indicted on March 26, 1993 for three offenses. Count I alleged defendant had attempted to possess with intent to distribute cocaine, Count II charged that defendant had possessed with intent to distribute heroin, and Count III alleged defendant possessed a firearm during and

in relation to a drug trafficking offense. On April 1, 1993 the United States sought and obtained leave to dismiss Count One of the indictment due to insufficient evidence to meet government's burden of proof at trial.

On May 17, 1993, prior to commencement of trial, the defendant filed a Motion-In-Limine to prevent the government from introducing evidence of, inter alia, the fact that defendant was attempting to purchase 17 kilograms of cocaine, that defendant was arrested for attempting to possess the cocaine, and any fact to support the probable cause for the

arrest of the defendant for attempting to possess cocaine. The defense argued that such facts constitute evidence of another crime not related to Counts II and III. In addition the government failed to provide notice under 404(B) that it intended to introduce evidence of other crimes at trial. After considering argument to the contrary by the Assistant United States Attorney (AUSA), the court ruled that evidence seized from the defendant pursuant to the arrest was admissible, but reference to the arrest of the defendant was inadmissible.

MS. ALLEN: So it is my understanding

that the government would be able to introduce testimony concerning all items that were seized from he defendant once he was arrested?

THE COURT; Well, you've got two questions there. First, can you say he was arrested? Secondly, can you say what was found on him? Now, let's see if we can clarify that. Which are you objecting to, Mr. Broccoletti?

MR. BROCCOLETTI: I don't think that--- if they just say he was arrested, I think the jury is going to wonder what he was arrested for.---

THE COURT: Right.

MR. BROCCOLETTI: ---and I don't think that can come out.

THE COURT: All right. But do you have

any objection to saying what they found on him?

****

THE COURT: Oh, no. I think the presence of cash---large amounts of cash around any drug deal has always been admissible. I think that it is evidence that he had a whole lot of money and he hadn't brought anything yet, but it's the source of the money that I think the jury has a right to consider. So I will admit the $2000,000 but not in relation to any cocaine purchase.

MS. ALLEN: So just to make sure that I understand the court's order I will just direct Agent Davis to say that he had reason to believe that the defendant might want to go to a hotel and elicit from him---

THE COURT: I don't think he has to say anything except that---

MS. ALLEN: He was arrested---

THE COURT: ---except that "On such and such a day we searched his car and we searched his person and this is what we found."

MS. ALLEN: All right. Thank you. Your Honor.

MR. BROCCOLETTI: The Court will note our objection to its ruling.

Despite the court's ruling the AUSA made reference to the defendant's arrest ten times in her opening statement.

MS. ALLEN: ...So Mr. Staton was there and he was arrested at the hotel.

...Once Mr. Staton was arrested, he is

allowed to be searched, pursuant to his arrest and on his person $1,126 was found in his pocket. There was also a beeper found in his pocket. Mr. Staton was carrying a bag. You will see a picture of that bag and inside that bag there was $299,000.

Once Mr. Staton was arrested he was taken down to DEA headquarters and he was given his rights and he went through booking procedures.

Now, a booking procedure is what happens when anyone is arrested...

The procedure is then, once someone is arrested, we are allowed to do what is called an inventory search of the vehicle, and the purpose of the search is for many reasons.

...Since the defendant was arrested, we were allowed to take his shoes off his feet as

well, and he had size 10 1/2 Timberland shoes.

...The first person that you will hear is H.C. Davis---he's the agent---and he will tell you about the arrest.

...You will also hear from Bennell Powers. He is the person who took the booking---he's the person who arrested the defendant. He'll tell you that they said, "Cops, cops" or "Police, police." The defendant dropped the bag, took four or five steps away,. and then he was arrested.

After completion of the AUSA's opening argument, the court declared a mistrial at the defense's motion.

MR. BROCCOLETTI: I have a motion for a mistrial. The Court ruled that she was not

to talk about the defendant being arrested. Even, I think Miss Allen agreed that the defendant was arrested. She didn't say arrested for what. The jury is going to wonder why. I counted four times during her opening statement when she said the defendant had been arrested.

THE COURT: That's exactly right. I told you not to say anything about his being arrested, it wasn't necessary, just found it on him. And we discussed the fact that if you talked about him being arrested, that would raise a question for the jury that wouldn't be answered. All right, I grant the mistrial.

The Court's order stated that,

During the government's opening statement, the AUSA violated the rulings of the court by telling the jury on several occasions that a search of the defendant's person and his

> automobile was made pursuant to an arrest. The mention of the arrest was contrary to the Court's ruling. The Court having ruled that because the arrest was for a different transaction for which the defendant was never prosecuted, that the mention of such arrest would be prejudicial to the defendant.

After the mistrial was declared, the defendant was reindicted on Count I of the original indictment. The defendant filed a motion to dismiss Counts I and II of the indictment on the ground that retrial would violate the double jeopardy clause of the 5th Amendment of the United States Constitution.

On July 6, 1993, the Court considered this

motion. At the hearing the defense argued that at trial the AUSA intentionally goaded the defense into seeking a mistrial, and because of these actions the United States is barred from reprosecuting the defendant on those charges. In support thereof the defense noted that immediately after the Court ruled that the government could not refer to the defendant's arrest, the AUSA referred to the arrest many times in her opening argument. In addition the AUSA reindicted the defendant on Count One after the mistrial was granted. Furthermore, the AUSA told one of the defense attorneys, Albert L.

Fary, Jr., that she reindicted the defendant to get around the Court's ruling that prohibited her from mentioning the defendant's arrest.

> THE COURT: What you are trying to do is you are trying to put in evidence that I ruled out at the last trial by reindicting it, and you have just admitted that. right?
>
> MS. ALLEN: Yea, but that's not---that's not why the mistrial was granted...

Under ordinary circumstances a defendant's request for a mistrial removes any constitutional barrier to retrial. However the Supreme Court of the United States has recognized an exception to this rule. Where governmental conduct is intended to goad

the defendant into moving for a mistrial, a second trial will be barred. Oregon v. Kennedy, 456 U.S. 667, 676 (1982).

The Kennedy court recognized that examination of a prosecutor's intent is not entirely free from practical difficulties. However it reasoned that this examination merely calls for the court to make a finding of fact. "Inferring the existence or non-existence of intent from objective facts and circumstances is a familiar process in our criminal justice system. Id. at 675. Indeed the government instructs juries as how to ascertain

intent daily. When intent is in issue, the government offers the following jury instruction as guidance.

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statements made and anything done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> Devitt and Blackman, Federal Jury Practice & Instructions, §§14.13 (3d. ed. 1977).

The Sixth Circuit has recognized the difficulty in examining prosecutorial conduct if the

inquiry is restricted to the record made at an aborted trial. The court must have wide latitude to inquire into all circumstances surrounding declaration of a mistrial and make findings of fact which may be reviewed on appeal. United States v. Wilson, 534 F.2d 76, 82 (1976).

Consequently a review of the totality of the circumstances, conduct prior to, during, and after the trial, is necessary to determine the prosecutor's intent. The trial transcript reveals that despite the AUSA's dismissal of Count I of the indictment, she had planned on alluding to circumstances

surrounding the cocaine arrest at the trial for the heroin and firearm offenses. Before trial began, however, the court ruled that comments regarding the arrest or the circumstances leading to the arrest were impermissible. This ruling proved troublesome to the AUSA as evidenced by her comments at the July 6, 1993 hearing.

> MS. ALLEN: Because, Your Honor, for me to tell a jury in this day and age that you are going through someone's car, you are going through someone's pockets, you are inventorying their car, they are going to be wondering why,...

This statement reflects that the prosecutor realized

it would be difficult to convince a jury of the defendant's guilt on Counts II and III without relating any of the background.

In cases where the prosecution wants to force a mistrial, we presume that the prosecutor is unprepared or is unhappy with the trial's progress and wants another opportunity to retry the defendant. Greyson v. Kellam, 937 F.2d. 1409, 1413 9th Cir. (1991). The court also looks to probable motive for the prosecutor to seek an untimely end to the first trial when deciding intent. See U.S. v. Serra, 882 F.2d 471, 473 (11th Cir.

1989). The adverse ruling, prohibiting mention of the defendant's arrest, caused problems for the government's case and provided a motive for the AUSA to provoke a mistrial. A forced mistrial would create the opportunity to reindict the defendant on Count I and would eliminate the dilemma posed by the order.

At the July 6th hearing the AUSA pointed out that in his explanation of the mistrial, the judge told the jury he did not believe she violated his ruling deliberately. However the judge's later comments indicate that he was not convinced that

the violation was inadvertent.

> MS. ALLEN: Well, Your Honor, if you look at page 29, you are telling the jury that even though I disregarded your ruling, you --- and that is right there in the heat of the moment --- did not think I had done so deliberately.
>
> And then secondly, ---
>
> THE COURT: I was trying to be polite.

At the July 20, 1993 hearing the judge further explained the comment made to the jury.

> MS. ALLEN: I don't think the 4th Circuit would disagree with you as a finding of fact, and you found during the opening argument that even though I had violated your order that --- you said, I hesitate to even state that is was misconduct --- that's what you said --

- and I don't think she meant to do it.

THE COURT: Well, I said that to the jury to try and save your face, but because I was trying to be kind to you shouldn't mean that this fellow ought to be put in double jeopardy.

Further evidence of intent is the AUSA's reaction, or lack thereof, to the motion for mistrial. In his concurring opinion in Oregon v. Kennedy, Justice Powell noted that a prosecutor's resistance to, or surprise by, a defendant's motion for mistrial is a factor to consider in ascertaining intent. Kennedy, 456 U.S. at 680. In the present case when the defense counsel motioned for a mistrial,

the prosecutor made no objection and did not resist the declaration of a mistrial. Nor did she indicate that she was surprised by the motion. This reaction supports the claim that the prosecutor intentionally provoked and welcomed a mistrial.

Perhaps the strongest proof of intent is the AUSA's action after the mistrial was declared. The AUSA used this opportunity to reindict the defendant on Count I. This action vitiated the court's prior ruling prohibiting reference to the arrest. Such action is consistent with an intentional trigger of a mistrial.

The AUSA's statements, both to counsel outside of court and to the Court, similarly reflect deliberate intent.

> MR. FARY: I called [Ms. Allen] back, and we were discussing the case, and I asked her, I said, why did you reindict him on these charges? And she laughed and said, well, it was the only way to get around Judge Clarke's ruling.
>
> ***
>
> THE COURT: What you are trying to do is you are trying to put in evidence that I ruled out at the last trial by reindicting it, and you have just admitted that. Right?
>
> MS. ALLEN: Yea, but that's not why the mistrial was granted...

The AUSA represented to the court that she dismissed Count I of the indictment because she did not wish to bring the informant to trial and reveal his identity. However the defense informed the court that the defense was already aware of the informant's identity pursuant to a DEA debriefing.

Another factor to be considered in ascertaining intent is whether the delay caused by the mistrial allows the prosecution a more favorable opportunity to convict the defendant. See United States v. Jorn, 400 U.S. 470, 485 (1971). In the

case at hand the government has used the delay to position itself in a more favorable posture.

> THE COURT: ...Now, I ruled under the case law that I was bound to rule in your favor. But frankly I would hope the 4th Circuit would reverse me because I think the government has taken advantage of your mistake to put this man in worse jeopardy than he was before, and I don't understand why you don't understand that.

As indicated by the jury instruction, intent must be inferred from surrounding circumstances. A review of the circumstances before, during and after trial all lead to the same conclusion. That determination is that after realizing that she could

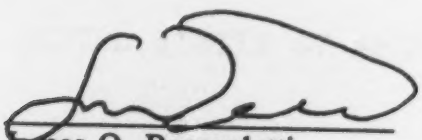
not refer to the arrest, the AUSA sabotaged her opening statement, forcing a mistrial and creating the opportunity to reindict the appellant on Count I. In the process the AUSA was able to salvage her case against the appellant.

CONCLUSION

For all these reasons, appellant prays that

the court will grant this Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

A. Order of the United States District Court, Eastern District of Virginia, Norfolk Division, Dated July 8, 1993 . . . . . A-1

B. Unpublished opinion of the United States Court of Appeals for the Fourth Circuit dated May 31, 1994. . . . . A-27

C. Amendment V to the Constitution of The United States A-48

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 93-94-N**

CHORYA A. STATON

ORDER

This matter is before the Court on the Motions of Defendant to Dismiss Counts II and II Due to a Violation of the Double Jeopardy Clause and to Suppress the Gym bag and Bally Shoes.[1] For the reasons stated below, the Motion to Dismiss is DENIED, the Motion to Suppress the gym bag is

---

1 A 404 (b) and conflicts of interest motion were rendered moot before the hearing as defense counsel informed the Court that the defendant did not intend to testify at trial. In the event defendant changes his mind, the Court will reconsider these motions.

CONTINUED, and the Motion to Suppress the shoes is DENIED.

BACKGROUND

The Defendant, Chorya A. Staton, was arrested on February 27, 1993, as he was about to meet a Drug Enforcement Agency ("DEA") informant at a motel to purchase 20 kilograms of cocaine. Following this arrest, the car in which Defendant had arrived at the motel was taken to DEA headquarters and searched for inventory purposes. A loaded firearm was found under the driver's seat and a gym bag was found in the trunk.

Inside the bag was, among other things, a pair of men's Bally shoes, size 10 1/2, in which heroin was found. At the time of his arrest, the Defendant was wearing a pair of Timberland shoes, size 10.

On March 15, 1993, the DEA agent who arrested the Defendant, Agent Davis, accompanied an IRS agent to execute a search warrant of Defendant's home obtained by the IRS to determine the scope of suspected money laundering and drug activities in which the Defendant was allegedly engaged. The search warrant authorized the seizure of documents, books, notes, papers, etc., associated

with these activities. During the search of Defendant's bedroom closet, agent Davis observed approximately forty to fifty pairs of men's shoes. He also observed, in plain view, two Timberland shoe boxes, size 10, and men's Bally shoes, which resembled the ones found in the trunk of Defendant's car. Davis looked through the boxes and in the shoes to determine if any money laundering papers were hidden inside. Upon closer examination of the Bally shoes, he noticed they were size 10 1/2. He did not seize any of the boxes or shoes.

On March 23, 1993, Defendant was indicted for Attempting to Possess with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 846 & 841 (a)(1) (Count 1), Possession with Intent to Distribute Heroin in violation of 21 U.S.C. § 841 (a)(1) (Count II) and for Use of a Firearm During and in Relation to Drug Trafficking in violation of 18 U.S.C. § 924 (c)(1) (Count III). On April 1, 1993, the Assistant United States Attorney ("AUSA") dismissed without prejudice Count I due to the insufficiency of evidence required for it to meet its burden of proof at trial. Trial was

subsequently set for May 17, 1993 on the remaining two counts.

On the morning of trial, Defendant filed a Motion in Limine requesting this Court to suppress the testimony of Agent Davis regarding the facts and circumstances surrounding the Defendant's arrest for Count I. The testimony would have shown that Defendant was arrested pursuant to the Charges in Count I, and that Counts II & III arose from an inventory search subsequent to the arrest in Count I. The Court granted the motion and informed the AUSA that her witness could only say

"on such and such a day we searched his car and we searched his person and this is what we found." Trial transcript ("TR") at 12. Only the defense noted its objection to this ruling.

Notwithstanding the Court's ruling, the AUSA referred to the arrest which precipitated the inventory search no less than ten times in her opening statement. TR at 21-28. Consequently, defense counsel made a motion for mistrial for violating the Court's order. The Court granted mistrial and informed the jury that

> during the opening statement, [the AUSA]

> violated one of the rulings I made. I'm sure she didn't do it deliberately, but she did it -- she did it, nonetheless, and she brought to your attention in the opening statement something that I had ruled that she could not do, and on the basis of that -- I hesitate to say misconduct -- but anyway, on the basis of the [AUSA] not obeying my rulings the defense attorneys asked for a mistrial, and I've granted it.

TR at 29.

On June 14, 1993, the AUSA reindicted Defendant on Count I. Trial on all three counts was subsequently set for July 21, 1993. On June 22, 1993, Defendant filed a Motion to Dismiss Counts II & III contending a retrial would violate

the double jeopardy clause of the Fifth Amendment of the U.S. Constitution and a Motion to Suppress a gym bag. On June 24, 1993, Defendant filed a Motion to Suppress a pair of men's shoes.

MOTION TO DISMISS COUNTS II & III

In his Motion to Dismiss, Defendant contends the Double Jeopardy clause of the Fifth Amendment bars a retrial on Counts II & III because the AUSA intentionally provoked him into moving for a mistrial. Where a court grants a defendant's motion for mistrial, the defendant may not raise the bar of double jeopardy to retrial absent

proof of prosecutorial conduct intended to provoke or "goad" the defendant into moving for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 676 (1982). It is not enough that misconduct is "overreaching." Id. The question of provocation is one of fact, and the defendant has the burden of proving the prosecutor's intentional provocation. United States v. Borromeo, 954 F.2d 245,247 (4th Cir.), cert. denied, 112 S. Ct. 3012 (1992); United States v. Wentz, 800 F.2d 1325 (4th Cir. 1986),

Defendant contends the AUSA intentionally provoked him into requesting a mistrial by referring

numerous times to his arrest in her opening statement. In support, defense counsel also states AUSA later told him that she reindicted Defendant on Count I to "get around" the Court's ruling so that she could mention the arrest. The Court **FINDS** that there is no evidence that the AUSA intentionally caused a mistrial at the time she made her opening statement, and thus Defendant has not met his burden.

Where mistrials have been granted on defendants' motions, other courts have held that prosecutorial conduct more egregious than that

involved here did not form the basis of intentional provocation or goading sufficient to raise the bar of double jeopardy. See e.g. United States v. Borromeo, 954 F.2d 245, 247-48 (4th Cir.) (Prosecutor's introduction of suppressed evidence not an attempt to provoke mistrial even though it gained de facto continuance useful to the government), cert. denied, 112 S.Ct. 3012 (1992); United States v. Jozwiak, 954 F.2d 458, 460 (7th Cir.) (Prosecutor's opening statement mentioning guilty please of codefendants not an attempt to provoke mistrial where prosecutor is a novice and

mistake made so early at trial), cert. denied, 112 S. Ct. 1512 (1992) ; United States v. Barcelon, 814 F.2d 165, 167-168 (5th Cir.) (Prosecutor's failure to disclose evidence not intended to goad defendant into moving for mistrial), cert. denied, 483 U.S. 1022 (1987).

Moreover, even flagrant prosecutorial misconduct has not been held to have intentionally provoked the defendant into moving for a mistrial. See e.g., United States v. Wentz, 800 F.2d 1325 (4th Cir. 1986) (prosecutor's introduction of evidence beyond scope of indictment not intended to

goad defendant); United States v. GAF Corp., 884 F.2d 670 (2nd Cir. 1989) (failure of prosecutor to reveal existence of expert report regarding hey documents did not amount to goading defendant into moving for mistrial); United States v. White, 914 F.2d 747 (6th Cir. 1990) (Prosecutor's deliberate attempt to get objectionable evidence into record through leading question posed to own witness did not amount to intentional provocation); Greyson v. Kellam, 937 F.2d 1409 (9th Cir. 1991) (Prosecutor's reference to testimony of government witness whom prosecutor knew would not testify

showed prosecutor's overzealous desire to convict not intention to goad defendant into moving for mistrial); United States v. Serra, 882 F.2d 471 (11th Cir. 1989) (Prosecutor's mentioning of defendant's dealings with counterfeit $100 dollar bills in prosection for counterfeiting and conspiracy charges arising from alleged dealings in counterfeit five dollar bills not intended to provoke defendant into moving from mistrial).

The alleged AUSA's "misconduct" in this case is much less severe. The AUSA has represented to the Court that the mention of arrest

was due to her misunderstanding of the Court's order. At the time the motion for mistrial was made, the record indicates the Court agreed with this. At the hearing on the motion, the AUSA stated that she understood the Court's ruling to be that testimony of what occurred after the arrest could be mentioned. She mentioned the arrest (Count I) only to inform the jury as to the events leading up to the inventory search (basis of Counts II & III). She further represented that Count I was initially dropped because she could not bring a key informant to Norfolk; therefore she believed there

was insufficient evidence to support Count I. Upon the informant's availability, Defendant was reindicted on Count I. Accordingly, the Court **FINDS** that the AUSA did not intentionally provoke or goad the Defendant to move for a mistrial.

MOTIONS TO SUPPRESS

1. Gym bag

Staton first challenges the warrantless search of the gym bag found in the trunk of the vehicle he drove to the motel. Generally, warrantless searches are per se unreasonable. U.S. Const. amend. IV; Mincey v. Arizona, 437 U.S. 385 (1987).

Moreover, evidence seized in violation of the Fourth Amendment must be excluded at trial. Weeks v. United States, 232 U.S. 383 (1914). However, a warrantless inventory search of a vehicle and its contents are lawfully within police custody and the inventory is conducted pursuant to established police procedures. Colorado v. Bertine, 479 U.S. 367 (1987); South Dakota v. Opperman, 428 U.S. 364 (1976). Similarly, closed containers within the vehicle may be opened provided established police procedures are followed. Florida v. Wells, 495 U.S. 1 (1990).

In this case, the Court first **FINDS** that the vehicle was properly impounded. The DEA agents observed the Defendant drive to the arranged situs of the drug deal in the vehicle which was subsequently impounded. The Defendant was arrested shortly after exiting the vehicle, leaving the car unoccupied in the parking lot. Although arguably the vehicle could have been left at the motel parking lot because it was not on a public street nor blocking traffic, it was reasonable for the police to impounded the vehicle in order to protect the vehicle and its contents from damage, theft, or

vandalism. Cf. United States v. Frank 864 F.2d 992, 1001 (3rd Cir. 1988) (reasonable to remove vehicle from public parking area of motel following defendant's arrest), cert. denied, 490 U.S. 1095 (1989).

Although the vehicle was properly in police custody, it is not clear that the inventory search of the vehicle and, in particular, of the closed container (gym bag) inside the trunk of the vehicle, was conducted according to established police procedures. Agent Davis testified that he followed DEA procedures governing inventory searches of

impounded vehicles; however, he did not specify what those procedures are and the extent to which an individual officer may exercise discretion in deciding whether or not to open any closed containers. Accordingly, the Court will **CONTINUE** the Motion to Suppress the gym bag until trial at which time the motion will be granted if the government is unable to prove that standard police procedures existed and were in fact followed.

2. Shoes

Defendant next challenges Agent Davis'

picking up and observation of the size of the shoes found in the closet of Defendant's bedroom. The warrantless seizure of an item in plain view is valid if the police officer is in a legitimate viewing position, the incriminating character of the evidence is immediately apparent, and the officer has a lawful right to the object itself. Horton v. California, 496 U.S. 128 (1990). In this case, Agent Davis was in Defendant's bedroom closet pursuant to an I.R.S. search warrant authorizing the seizure of documents, books, notes, papers, and other items associated with drug activities and

money laundering; therefore, Agent Davis was in a legitimate viewing position. The Court **FINDS** that it was reasonable for Agent Davis to pick up and look inside the shoes found in Defendant's closet because items in the search warrant such as currency or other papers could easily have been hidden inside the shoes. Finally, because the shoes matched those found in the trunk, the incriminating nature was immediately apparent. Therefore, the shoe sizes at issue were observed in plain view, and Defendants Motion to Suppress the shoes is **DENIED**.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is **DENIED**, the Motion to Suppress the gym bag is **CONTINUED**, and the Motion to Suppress the shoes is **DENIED.**

The Clerk is **DIRECTED** to send a copy of this Order to the Assistant United States Attorney and counsel for Defendant.

IT IS SO ORDERED.

_____
United States District Judge

Norfolk, Virginia
July 7, 1993

APPENNDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Petitioner

v. **No. 93-5561**

CHORYA A. STATON,
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk,
J. Calvitt Clarke, Jr., Senior District Judge.
(CR-93-49)

Argued: February 9, 1994

Decided: May 31, 1994

Before HAMILTON and WILLIAMS, Circuit Judges, and OSTEEN, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: James Orlando Broccoletti, ZOBY & BROCCOLETTI, Norfolk, Virginia, for Appellant.

Arenda L. Wright Allen, Assistant United States Attorney, Norfolk, Virginia, for Appellee. **ON BRIEF:** Kimberly L. Shoemaker, ZOBY & BROCCOLETTI, Norfolk, Virginia; Albert L. Fary, Jr., ALBERT L. FARY, JR., P.C., Portsmouth, Virginia, for Appellant. Helen F. Fahey, United States Attorney, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

This appeal presents only one issue: did the trial court err in finding that the prosecutor did not intentionally goad or provoke Defendant-Appellant Chorya A. Staton into moving for a mistrial, thus permitting his retrial in violation of the Fifth

Amendment's Double Jeopardy Clause? For issues turning on factual controversy such as intentional prosecutorial provocation, the trial court's findings must be affirmed unless they are clearly erroneous. *United States v. Wentz*, 800 F.2d 1325, 1327 (4th Cir. 1986). For the reasons given below, we now affirm.

I

Staton was arrested on February 27, 1993, as he was about to meet a DEA informant in a motel room to purchase 20 kilograms of cocaine. Following his arrest, officers searched the bag he carried with him into the room; in it they found $199,000. An inventory search of Staton's car conducted at DEA headquarters revealed, among other things, a loaded firearm under the driver's seat, and a bag containing 200 grams of heroin located in the trunk.

A grand jury subsequently indicted Staton on three charges: attempt to possess cocaine with intent

to distribute; possession of heroin with intent to distribute; and possession of a firearm during and in relation to a drug trafficking offense. Several weeks before trial, the government moved to dismiss the cocaine possession charge due to insufficient evidence.

At trial, after jury selection but before opening statements, Staton filed a motion in limine to prevent the introduction of evidence concerning the events leading up to his arrest for attempted possession of cocaine. He argued that those facts constituted evidence of another crime not related to the charges on which he was to be tried. After considering the government's position that it should be permitted to give the historical background of the case, the court ruled that the evidence seized pursuant to the arrest was admissible, but any reference to the arrest itself was inadmissible.

> MS. ALLEN [for the government]: So it is my understanding that the government would be able to introduce testimony

concerning all items that were seized from the defendant, once he was arrested?

THE COURT: Well, you've got two questions there. First, can you say he was arrested? Secondly, can you say what was found on him? Now, let's see if we can clarify that. Which are you objecting to Mr. Broccoletti?

MR. BROCCOLETTI [for the defendant]: I don't think that -- if they just say he was arrested, I think the jury is going to wonder what he was arrested for,--

THE COURT: Right.

MR. BROCCOLETTI: -- and I don't think that can come out.

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MS. ALLEN: So just to make sure that I

understand the Court's order, I will just direct Agent Davis to say that he had reason to believe that the defendant might want to go to a hotel and elicit from him --

THE COURT: I don't think he has to say anything except that --

MS. ALLEN: He was arrested--

THE COURT: --except that "On such and such a day we searched his car and we searched his person and this is what we found."

MS. ALLEN: All right. Thank you, Your Honor.

(J.A. at 22, 26.)

In its opening statement, the government used the word "arrest" ten times, seven of which were specifically in reference to Staton's arrest.

Staton did not object at any point during the prosecutor's statement, nor did the court interrupt to admonish the prosecutor for violating its ruling. At the end of the statement, Staton moved for a mistrial which the court granted.

> MR. BROCCOLETTI: I have a motion for mistrial. The Court ruled that she was not to talk about the defendant being arrested. Even, I think Miss Allen agreed that the defendant was arrested. She didn't say arrested for what. The jury is going to wonder why. I counted four times during her opening statement when she said the defendant had been arrested.
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> THE COURT: That's exactly right. I told you not to say anything about his being arrested; it wasn't necessary, just found it on him, and we discussed the fact that if you talked about him being arrested, that would raise a question for the jury that

couldn't be answered. All right. I grant the mistrial.

(J.A. at 42,43.)

One month later, the government reindicted Staton on the two charges for which he went to trial and on the cocaine charge which had been previously dismissed. Staton then filed a motion to dismiss the heroin and firearms charges.

At a hearing on the motion, Staton argued that at the trial the government intentionally goaded the defense into seeking a mistrial and that therefore, because of its actions, it was barred from prosecuting him again on those charges. In support of its position, the defense noted that immediately after the court ruled that the government could not refer to the defendant's arrest, the government referred to the arrest numerous times in its opening statement. In addition, the government reindicted Staton on all three of the original counts after the mistrial was granted. Further, the government

attorney told one of the defense attorneys that she reindicted Stanton in order to get around the court's ruling that prohibited her from mentioning the arrest, which she then admitted to the judge:

> THE COURT: Why did you reindict him?
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> MS. ALLEN: Because, Your Honor, for me to tell a jury in this day and age that you are going through someone's car, you are going through someone's pockets, you are inventorying their car, they are going to be wondering why, and I don't care whether he is --
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> THE COURT: That's exactly what you indicated to Mr. Fary on the phone.
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> MS. ALLEN: I don't --
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> THE COURT: That you did it to get around my ruling.

MS. ALLEN: Your honor --

THE COURT: And you are saying that right now.

MS. ALLEN: Your Honor, I'm trying to paint a full picture for the jury. We are after the truth here, and whether it's --

THE COURT: What you are trying to do is you are trying to put evidence that I ruled out at the last trial by reindicting it, and you have just admitted that. Right?

MS. ALLEN: Yeah, but that's not -- that's not why the mistrial was granted.

(J.A. at 73,74.)

In turn, the government contended that it's reference to Staton's arrest in opening statement was a result of misunderstanding of the court's ruling and not an intentional act to provoke a

mistrial:

> MS. ALLEN: If you look at the transcript, it is still not clear in my mind that you told me not to say the word "arrest," and if you look --
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> THE COURT: That was the whole purpose of the dialogue before the court, and I don't see how -- I gave you explicit instructions that you could say you searched him.
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> ***
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> MS. ALLEN: Well, I do, I admit -- Your Honor, I didn't object to your ruling. Mr. Broccoletti objected to your ruling, and I didn't understand your ruling. I thought that I was allowed to say anything from the arrest thereafter, as opposed to the arrest prior to. That was my understanding of the court's ruling. And it would have been ridiculous for me to get up there and say ten

times "arrest," if you had said Ms. Allen, don't say arrest.

THE COURT: Unless you were trying to do exactly what they claim you are trying to do, and that is trigger a mistrial.

(J.A. at 70-71.)

The government further represented that it had dropped the cocaine charge initially because the prosecutor could not bring a key informant to Norfolk and therefore, it believed that there was insufficient evidence to support the charge. In response the court observed:

But I have gotten two different reasons from you about why it was dismissed, and I don't know which one to believe. One of them you say, was because you didn't have enough evidence, and I understand you represented that to the court when you dismissed it. Now you say it is because the

> New York DA wanted to hide his [the key witness's] identity.

(J.A. at 72-73.)

The court concluded the hearing on the issue by stating:

> It is very -- I might say it is a very difficult matter for me. I certainly don't want to mistrust the motives of a United States attorney, but I have got to say that the repeated reference to arrest and going into details about booking procedures and searches of automobiles and all of those things, on top of my ruling, but I think more particularly coming back with the reindictment on the first count and stating to Mr. Fary on the phone that you were doing it to get around my ruling, and then in effect denying it and admitting in the same argument here before me is very troubling

to the court. But I want to think about it a little bit more.

(J.A. at 77.)

Notwithstanding its misgivings regarding the prosecutor's conduct, the court found in a written ruling issued the following day that the government did not intentionally provoke Staton into requesting a mistrial. The court noted that in other cases, courts have held that prosecutorial conduct more egregious than that involved in this case did not comprise intentional provocation or goading sufficient to prevent retrial and that even in cases involving flagrant prosecutorial misconduct, courts have ruled that the defendant was not provoked into requesting a mistrial. In contrast, the court considered the alleged prosecutorial misconduct at issue in this case to be much less severe.

II.

In repeating the argument he presented to the

trial court, Staton relies on *Oregon V. Kennedy*, 456 U.S. 667 (1982). In that case, the Supreme Court held that retrial of a defendant who requests a mistrial violates the Double Jeopardy Clause only when the prosecutor provoked or goaded the defendant into moving for mistrial with the intent to subvert the protections provided by the Clause. *Id.* at 676. Harassing or overreaching conduct does not suffice absent intent. *Id. at 675-76. The burden of proof is on the defendant to show that the prosecutor intentionally provoked him. United States v. Borromeo*, 954 F.2d 245,247 (4th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 3012 (1992)

The circumstantial evidence of the prosecution's intent to force the defendant in this case to move for mistrial is strong. The Assistant United States Attorney ("AUSA") had a clear motive to provoke a mistrial, as the court had just ruled against her on what she apparently believed was an important part of her case. She acted immediately, and directly contrary, to the court's ruling. When the judge granted the mistrial, the

AUSA did not object, much less object as vigorously as she should have if she did not want a mistrial. (Likewise, she did not object to the ruling, violation of which gave rise to the mistrial.) *Cf. United States v. GAF Corp.*, 884 F.2d 670 (2d Cir. 1989) (finding no provocation where government suggested at least for ways to avoid mistrial and objected when a mistrial was granted). Further, the government took advantage of the grant of a mistrial by reindicting Staton on the cocaine charge, reference to which the judge had ruled could not be made at the first trial. Finally, the AUSA admitted to the court that she reindicted Staton at least in part in order to get around its earlier ruling.

With this evidence before it, the district court nonetheless determined that the AUSA did not act intentionally in causing Staton to request a mistrial:

> The AUSA has represented to the Court that the mention of arrest was due to her

misunderstanding of the Court's order. At the time the motion for mistrial was made, the record indicated the Court agreed with this. At the hearing on the motion, the AUSA stated that she understood the Court's ruling to be that testimony of what occurred after the arrest could be mentioned. She mentioned arrest (on Count 1) only to inform the jury as to the events leading up to the inventory search (basis of Counts II & III). She further represented that Count I was initially dropped because she could not bring a key informant to Norfolk; therefore she believed there was insufficient evidence to support Count I. Upon the informant's availability, Defendant was reindicted on Count I.

United States v. Staton, Criminal No. 93-94-N, at 6(E.D. Va. July 8, 1993) (order denying defendant's motion to dismiss Counts II and III).

In sum, these facts present a close case that

comes down to a determination of the credibility of the AUSA. In light of the fact that the trial judge was familiar with the events leading to Staton's motion for a mistrial and the fact that the judge "was uniquely positioned to characterize the conduct of government," this court cannot say on review that the district court's findings were clearly incorrect. *United States v. Wentz,* 800 F.2d 1325, 1328 (4th Cir. 1986).

Our conclusion, like that of the district court, is further substantiated by the caselaw. In finding that the government's conduct did not amount to intentional provocation, the district court relied on two decisions of this court in which the misconduct at issue was clearly more impermissible and more prejudicial to the defendant than that presented here, but nonetheless not so egregious as to bar retrial. In *United States v. Borromeo*, 954 F.2d 245,247 (4th Cir.), *cert. denied*, __U.S. __, 112 S.Ct. 3012 (1992), we found that the prosecutor's introduction of suppressed evidence at the end of its case was not intended to provoke a

mistrial, even though the government purportedly gained a *de facto* continuance necessitated by the unavailability of its expert witnesses. Similarly, in *United States v. Wentz*, 800 F.2d at 1327-28, affirmed the trial court's ruling that the government's introduction of evidence beyond the scope of the indictment resulted either from its negligence or its ignorance, not from any bad faith on its part.

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*The Fourth Circuit case relied upon by Staton in support of his position is inapposite to the issue presented. Although this court deemed the prosecutorial misconduct involved in *United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993), to be so egregious as to warrant a new trial even under the stringent plain error standard, the case is procedurally distinguishable because it concerned a request to undergo, not to avoid, a second trial. We will not decide at this time if the conduct involved in *Mitchell* would satisfy the strict standard spelled out in *Kennedy*.

As well, the relevant cases relied upon by Staton decided by other courts, like the cases reviewed by the district court, involve more reprehensible conduct. *See United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976); *United States v. Broderick*, 425 F.Supp. 93 (S.D. Fla. 1977). Further, both of these cases were decided several years before *Kennedy*; it is questionable whether the conduct at issue in them would pass that decision's narrow test.

III.

The district court found the prosecutor's comments and actions very troubling, a finding with which this court is in full agreement. Nevertheless, because the district court's findings of fact are not clearly erroneous and are further supported by precedent within this Circuit, the district court's ruling denying Defendant-Appellant Staton's motion to dismiss will be affirmed.

AFFIRMED

APPENDIX C

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.